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In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-573

PATRICIA F. CLARK, WILLIAM S. MARTIN, AND JOHN N. SATRE,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Patricia F. Clark, William S. Martin, and John N. Satre petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 19, 1977.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, is reprinted in the appendix, *infra*, at 16a-28a. The opinion of the United States District Court for the Southern District of Georgia, Brunswick Division (Alaimo, D.J.), is not reported and is reprinted in the appendix, *infra*, at 1a-16a.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 19, 1977. The Court's jurisdiction to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the Court of Appeals erred in holding that probable cause existed for a warrantless search of petitioners' automobile?

2. Whether the Court of Appeals erred in holding that evidence was admissible even though the warrant pursuant to which the contraband was seized was issued pursuant to Ga. Code Ann. § 24-1601, a statute which by virtue of its monetary incentive provisions has been held to operate unconstitutionally (see *Connally* v. *Georgia*, 429 U.S. 245 (1977)).

Constitutional and Statutory Provisions Involved.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ga. Code Ann. § 24-1601 provided in pertinent part at the time applicable to this case[1]:

> The following shall be the fees for justices of the peace of this State and it shall be lawful for said justices of the peace to charge and collect the same:
>
> . . . . . .
>
> Issuing each search warrant $5.00

Statement of the Case.

Patricia F. Clark, William S. Martin, and John N. Satre seek review in this Court of the September 19, 1977, judgment of the United States Court of Appeals for the

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[1] This statute was superseded by a new § 24-1601 providing for payment to a justice of the peace for "[e]ach application for a search warrant" following this Court's decision in *Connally* v. *Georgia*, 429 U.S. 245 (1977).

Fifth Circuit affirming the judgments of conviction entered against them on September 8, 1976, following a truncated non-jury trial in the United States District Court for the Southern District of Georgia, Brunswick Division (Alaimo, D.J.).

Each has been convicted of one count of conspiracy to possess with intent to distribute, and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846. In addition, Satre and Martin were convicted of one count of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (App. 17a).[1]

The case against petitioners was based on contraband seized during a warrantless search of a truck and subsequent searches, pursuant to a warrant issued by a Georgia justice of the peace, of a cabin, boat and station wagon (App. 17a). Prior to trial petitioners moved to suppress the evidence seized on the grounds that the searches were unlawful. After a hearing, the District Court issued a decision on July 16, 1976, denying the motions (App. 1a-16a). At the truncated non-jury trial held on July 26, 1976, the government introduced a stipulation of facts supplemented by the brief testimony of one witness. Petitioners were found guilty and appealed. Their convictions were affirmed by the United States Court of Appeals for the Fifth Circuit on September 19, 1977 (App. 16a-28a).

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[1] Petitioners received the following sentences:

Clark — Six months imprisonment on the conspiracy count;

Satre — Five years imprisonment on the conspiracy count, and a $5,000 fine on the possession count;

Martin — Eighteen months imprisonment on the conspiracy count, and a $3,000 fine on the possession count.

Reasons for Granting the Writ.

I. The Court of Appeals Erred in Holding that Probable Cause Existed for a Warrantless Search of Petitioners' Automobile.

Petitioners maintain that a review of the facts as reported in the opinion of the Court of Appeals in no way supports a finding of probable cause to justify the warrantless search of the camper truck. Indeed, the very acts of the law enforcement officers involved support a finding that probable cause was absent. As the vehicle in question left Crooked River State Park the officers who had begun surveillance there radioed Agent Kennedy and, referring to the truck, asked him to "check it out" (App. 20a). Thus, the officers' actions support the contention that they themselves felt that probable cause to stop and search the truck was lacking, a factor erroneously denied its due significance by the Court of Appeals. See *United States* v. *Whitlock*, 418 F. Supp. 138 (E.D. Mich. 1976).

With regard to the standard for determining the existence of probable cause, this Court, in *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964), stated that the validity of warrantless police actions must be judged by whether:

> the facts and circumstances within [the knowledge of the arresting officers] and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Applying this standard, petitioners submit that the Court of Appeals erred in finding probable cause to search the truck

and, thus, this Court should grant the writ and reverse the decision of the court below.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT EVIDENCE WAS ADMISSIBLE EVEN THOUGH THE WARRANT PURSUANT TO WHICH THE CONTRABAND WAS SEIZED WAS ISSUED PURSUANT TO GA. CODE ANN. § 24-1601, A STATUTE WHICH BY VIRTUE OF ITS MONETARY INCENTIVE PROVISIONS HAS BEEN HELD TO OPERATE UNCONSTITUTIONALLY (SEE CONNALLY V. GEORGIA, 429 U.S. 245 (1977)).

The searches of the cabin, boat, and station wagon were conducted pursuant to a Georgia search warrant issued by a state justice of the peace, who, under the Georgia law then in effect (Ga. Code Ann. § 24-1601), received a fee of $5.00 each time he issued a warrant. If the warrant sought was refused, however, the justice received nothing for reviewing and denying the warrant application.[3]

In *Connally* v. *Georgia*, 429 U.S. 245 (1977), this Court held that this pecuniary interest precluded a Georgia justice of the peace from being the "neutral and detached magistrate" required by the Constitution. As a result, this Court found that a search warrant issued by a Georgia justice of the peace necessarily infringed upon the right, secured by the Fourth and Fourteenth Amendments to the Constitution of the United States, to be free from unreasonable searches and seizures. In the case at bar, the Fifth Circuit decided to "reject the parties' desire for us to expound upon the application of *Connally*" (App. 27a). Petitioners submit that in so doing the court erred; that the dictates of the *Connally* decision are applicable here; and that this case provides this Court with an opportunity to clarify the scope of that decision.

[3] This statute has since been supplanted by a new § 24-1601 providing for the payment of fees regardless of the action taken by the justice of the peace.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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Appendix.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA

vs. INDICTMENT No. 276-4

JOHN NEIL SATRE;
WILLIAM SCOTT MARTIN;
PAULA LYNN PASCOE;
PATRICIA F. CLARK;
KEVIN M. BENNETT

Order

Defendants in this case have been indicted and charged with violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The indictment is in four counts. Count One charges defendants, Satre, Martin, Pascoe, Clark, and Bennett, with conspiracy to possess with intent to distribute, and conspiracy to distribute, some 1,225 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1). Count Two charges defendants, Satre, Martin, and Pascoe, with conspiracy to import marijuana into the United States in violation of 21 U.S.C. §§ 960(a)(1) and 952(a). Count Three charges defendants, Satre, Martin, and Pascoe, with unlawful importation of marijuana into the United States in violation of 21 U.S.C. §§ 960(a)(1) and 952(a). Count Four charges defendants, Satre, Martin, and Pascoe, with possession with intent to distribute 1,225 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1).

Defendants, Satre, Martin, Pascoe, and Clark, seek to have suppressed all evidence seized during two searches performed on January 14, 1976, at or near the Crooked River State Park, Camden County, Georgia. The Court heard evidence on these motions at Savannah, Georgia, on May 31, 1976. For the reasons articulated below, the Court must deny all of defendants' motions to suppress.

The Facts

The chain of events leading to the searches questioned by these motions began when the suspicions of the Superintendent of the Crooked River State Park, Mr. Minchew, were aroused by what he viewed as peculiar behavior on the part of some of these defendants during a stay at the park some two years before the incident here at issue. At that time, Minchew recalled that defendant Satre had rented a cabin from him and that he, Minchew, had received complaints from other cabin renters regarding the nocturnal activities of Mr. Satre and his companions. Superintendent Minchew thus remembered Mr. Satre when, on December 30, 1975, he and at least three other persons rented two cabins from him for a term to end approximately two weeks later on January 10, 1976.[1]

Superintendent Minchew's suspicions were apparently again aroused on January 11, 1976, when a car with Idaho license plates carrying defendants, Martin and Pascoe, returned to the park a day after the Satre group had checked out and departed. These defendants explained to Minchew that they had travelled some fifty miles down the road

[1] Superintendent Minchew identified the three others with Satre at this time to be defendants, Martin, Pascoe, and Clark.

before discovering that they had forgotten a suitcase. They retrieved the luggage from the cabin and again departed. Then, on Tuesday, January 13, 1976, defendant Satre again appeared at the park, seeking to rent the same cabin he had earlier rented. He had a boat with him which was dripping water as if recently used. Satre explained that he had been skiing in Tampa, Florida, earlier that day, although the temperature, it was noted, was quite cold and Tampa some 250 miles distant. When notified that the same cabin was unavailable, he asked for another cabin, preferably surrounded by bushes in a secluded area. He was given cabin Number Six.

Minchew, at about 10:00 P.M., that evening, rode by the Satre cabin and observed that the same car that had returned on the preceding Sunday for the forgotten luggage was parked in front of Cabin Number Six, along with two other vehicles, a camper pick-up truck and a Chrysler station wagon. The boat was also outside the cabin. Upon seeing these familiar vehicles, Superintendent Minchew contacted the Camden County Sheriff's Office, asking that an officer or officers be dispatched to check into what he considered the suspicious activities of the inhabitants of Number Six.

Deputies Barber and Dudley of the Camden Sheriff's Office arrived at approximately 11:00 P.M., and had secured the license numbers of the vehicles parked outside Number Six;[2] but before they could run a check on the tag numbers, hammering noises were heard coming from the area in front of the cabin. Officers Barber and Dudley placed the cabin under surveillance, and, between 11:00 P.M., and 2:00 P.M., they observed defendants, Satre, Martin, and Pascoe,

[2] With the exception of the vehicle with the Idaho tags, which had apparently departed before the deputies arrived.

engaged in the process of building a wooden structure in the back of the truck and carrying to and from the boat and the cabin various plastic and burlap sacks which appeared to be heavy, loading them into the truck and the wagon. During this time the officers overheard the defendants speak of "taking this load" and "letting them have the best shipment." The deputies also overheard one defendant ask another whether the Park Superintendent had seen them and whether or not he had gotten the "gun," or the "shotgun."

At some point during this surveillance, the deputies radioed for further assistance and contacted Officer J. R. Kennedy, describing to him what had transpired and outlining their belief that these defendants were engaged in drug trafficking. Shortly thereafter, defendants ceased building and loading and two of them, defendants Satre and Martin, departed in the camper pick-up. Officer Kennedy, who was then en route to the park, was alerted that the camper was coming in his direction, was given the tag number, and told that he should "check it out."

Officer Kennedy spotted the camper coming out of the park and followed it, noting that it was weaving slightly and appeared heavily loaded. He pulled it over after another patrol car appeared on the scene. Defendant Martin, the driver, and Satre emerged from the truck. Martin produced a valid driver's license, but no vehicle registration. When asked by Officer Kennedy if he could take a look in the truck, Martin replied, "Go ahead." Officer Kennedy noted that Martin appeared "stoned," or high on drugs, and, indeed, Martin testified that he had smoked twelve "joints," or marijuana cigarettes, during the preceding day.

Officer Kennedy proceeded to inspect the truck. On the floor of the truck, through a window, he saw a plastic container with a substance in it that resembled marijuana. He testified that he smelled a strong odor of marijuana around

the truck. At this point he placed Martin and Satre, defendants, under arrest for violating Georgia's drug laws and searched the truck thoroughly. This search revealed a false bottom, partially completed, in the back of the truck, wherein were concealed a number of burlap and plastic bags containing a large quantity of hashish.

Following this arrest and search, a search warrant was issued, on the affidavit of Deputy Barber, for Cabin Number Six at the park and for the station wagon and boat. A search pursuant to the warrant resulted in the seizure of more hashish and marijuana from the cabin and the station wagon.[3]

Defendants challenge the search of the truck and the search of the cabin, boat, and station wagon, under the state warrant.

STANDING

Before confronting the question of the admissibility of the evidence seized during the searches, it is necessary first to examine the issue of standing. The government contends that only defendants, Satre and Martin, have standing to contest the legality of the search of the truck and then only as to Count Four, the possessory offense. As will be seen, the government's application of the law as to standing is in error.

An individual, in order to have standing to challenge the legality of a search under the Fourth Amendment, must ordinarily show himself to have been the victim of an invasion of privacy. *Jones v. United States*, 362 U.S. 257,

[3] Some of the suspect bags were plainly visible through the windows of the wagon.

261 (1960). Whether or not an individual's privacy has been invaded, in turn, depends on whether

> "he has an adequate possessory interest in the place or object searched to give rise to a reasonable expectation of privacy. Ownership usually constitutes such an interest, United States v. Banks, 5 Cir. 1972, 465 F.2d 1235, cert. denied, 409 U.S. 1062, 93 S.Ct. 568, 34 L.Ed.2d 514, but a reasonable expectation of privacy in the enjoyment of a place or object may attach where there is little or no proprietary interest." *United States v. Hunt*, 505 F.2d 931 (5th Cir. 1974). *See also United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976).

Thus, presence on the premises searched will ordinarily be sufficient, whereas mere ownership, as of a vehicle, may not. *Compare Jones v. United States*, 362 U.S. 257 (1960) *with United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976).

In addition to this notion of invasion of privacy, the Court, in *Jones v. United States, supra*, devised a rule of "automatic" standing. Automatic standing arises in cases in which possession of the seized evidence at the time of the search is an essential element of the offense charged. *See Brown v. United States*, 411 U.S. 223 (1973); *United States v. Hunt*, 505 F.2d 931 (5th Cir. 1974).

Applying these basic standing rules to the case at bar, it is clear that defendant, Patricia F. Clark, lacks standing to challenge either of these searches. She was not present at the time of either search and has shown no proprietary or possessory interest in the premises or in the goods seized. Furthermore, conspiracy to violate 21 U.S.C. § 841(a)(1), the only offense with which she is charged, is not a possessory offense. *See United States v. Foster*, 506 F.2d 445

(5th Cir. 1975); *United States v. Valencia*, 492 F.2d 1071 (9th Cir. 1974). Thus, as regards Ms. Clark, this statement from *Brown v. United States*, 411 U.S. 223 (1973), is dispositive of her motion:

> "In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States*, 411 U.S. 223, 229 (1973).

As for defendants, Martin, Satre, and Pascoe, all three are charged with a possessory offense in Count Four and thus, have automatic standing to challenge the legality of both searches as to that count. *See Jones v. United States*, 362 U.S. 257 (1960).

On the other hand, Counts One, Two, and Three are all non-possessory offenses. *See United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975); *United States v. Boston*, 510 F.2d 35 (5th Cir. 1974); *United States v. Valencia*, 492 F.2d 1071 (9th Cir. 1974). Thus, none of these defendants has automatic standing as to these counts.

Martin and Satre, who had just been occupants of the truck at the time of its search, may challenge the search of the truck as to all counts. Similarly, Ms. Pascoe may challenge the search of the cabin and the station wagon as to all counts because she was in the cabin when it was searched. She may not, however, challenge the search of the truck,

nor may defendant Martin challenge the cabin search, since he was not present and showed no proprietary or other interest in the cabin, boat or wagon. The burden on this issue is his. *Brown v. United States*, 411 U.S. 223, 226-27 (1973). Satre, however, was the lessee of the cabin, and this interest is sufficient to permit him to attack the cabin search as well as the truck search. *See United States v. Parizo*, 514 F.2d 52 (2d Cir. 1975).

THE SEARCH OF THE TRUCK

The law is well-settled that a moving vehicle may be stopped and searched without a warrant where there is probable cause for the search. *Carroll v. United States*, 267 U.S. 132 (1925); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970). Probable cause to search a vehicle for illegal drugs exists when the facts and circumstances warrant a reasonably prudent man to believe that the vehicle contains contraband. *See e.g., United States v. Nieto*, 510 F.2d 1118 (5th Cir. 1975). *See generally Brinegar v. United States*, 338 U.S. 160 (1949). Furthermore, "probable cause . . . can rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest," when there is "some degree of communication between the two." *Moreno-Vallejo v. United States*, 414 F. 2d 901, 904 (5th Cir. 1969). *See also United States v. Nieto*, 510 F.2d 1118 (5th Cir. 1975); *United States v. Wells*, 467 F.2d 65 (5th Cir. 1972).

In the present case, the facts and circumstances known to Officers, Kennedy, Barber, and Dudley, were sufficient to warrant a reasonably prudent man in believing that the

camper truck driven by Martin and Satre contained contraband. Taken all together, the lateness of the hour, the building activity, the inconsistencies in the stories they had told Minchew, references to "shipments" and "loads," the heavy burlap sacks commonly used for transporting drugs, these facts pointed to the likelihood and the probability that defendants were trafficking in drugs.

But even assuming that the totality of the facts in this case was insufficient to constitute probable cause to stop and search the truck, the search can be justified on an alternative ground. Officer Kennedy was authorized in this situation to make a purely investigatory stop of this truck. As the Court noted in *Adams v. Williams*, 407 U.S. 143, 145 (1972);

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. See id., at 23, 20 L.Ed.2d at 907. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

In this case, the defendants were on the move, the hour was late, the truck was moving erratically and appeared to be heavily loaded. Under these circumstances, an investigatory stop in order to determine the identity of the defendants "or to maintain the status quo momentarily" while the officer's

colleagues obtained more information, was reasonable, and thus proper. *See Adams v. Williams, supra*; *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Rollerson*, 491 F.2d 1209 (5th Cir. 1974).

When, after having made the stop, Officer Kennedy smelled marijuana inside the truck, he was, at that time, possessed of information giving him *probable cause* to search the truck and to arrest the defendants. *See United States v. Walker*, 522 F.2d 194 (5th Cir. 1975); *United States v. Santibanez*, 517 F.2d 923 (5th Cir. 1975); *United States v. Harris*, 404 F. Supp. 1117 (E.D. Pa. 1975).

Thus, whether the search is viewed as carried out pursuant to probable cause derived from the totality of circumstances surrounding the surveillance at Cabin Number Six, or from probable cause derived from facts arising during an investigatory stop, the seizure of the marijuana from the truck was valid under the Fourth Amendment.

In view of this disposition of the motions, it is unnecessary to determine the validity of Martin's consent to the search. It is also unnecessary to determine the exact point at which defendants were placed under arrest for purposes of a search incident thereto. See generally *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Chambers v. Maroney*, 399 U.S. 42, 46-47 (1970).

THE SEARCH OF CABIN NUMBER SIX, THE STATION WAGON, AND THE BOAT

Based upon an affidavit submitted by Deputy Barber,[4] a Justice of the Peace for Camden County issued a search

[4] A copy of the affidavit and warrant is in the Appendix to this order.

warrant authorizing the search of "Cabin # 6 Crooked River State Park all autos and out buildings & boats."

Defendants have attacked the validity of this warrant. They contend, essentially, that the facts presented to the magistrate were insufficient to support a findng of probable cause. They argue that this insufficiency obtains whether or not the search and seizure of marijuana from the truck is upheld, although they nonetheless contend that the impropriety of the truck search taints certain crucial facts alleged in Deputy Barber's affidavit. In other words, defendants contend that the affidavit is insufficient even considering the evidence derived from the truck search; without that evidence, they assert that the affidavit is even more inadequate.

Contrary to defendants' contentions, however, this Court has determined that the search of the truck and the seizure of the marijuana found therein were permissible under the Fourth Amendment. Furthermore, this Court holds that the facts presented to the magistrate in Deputy Barber's affidavit were sufficient to authorize a finding of probable cause to issue the warrant and that the warrant was not otherwise invalid.

Under the Fourth Amendment, a judicial officer issuing a search warrant may not properly do so unless he can find probable cause for the search from the facts and circumstances presented to him under oath or affirmation. *See Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Ventresca*, 380 U.S. 102, 107 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964).

> "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had responably trustworthy information,

> [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carrol v. United States, 267 U.S. 132, 162, 69 L. Ed. 543, 555, 45 S.Ct. 280, 39 ALR 790." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

But in reviewing a magistrate's finding of probable cause "the reviewing court will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer acting on his own without a warrant' . . . and will sustain the determination so long as 'there was substantial basis for [the magistrate] to conclude that narcotics were probably present . . . .'" *Aguilar v. Texas*, 378 U.S. 108 (1964). Affidavits must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. *United States v. Ventresca*, 380 U.S. 102 (1965); *Spinelli v. United States*, 393 U.S. 410 (1969). But in determining whether a finding of probable cause was warranted, a reviewing court may consider only information brought to the attention of the issuing officer. *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958).

In light of these standards, a consideration of the warrant issued for the search of Cabin Number Six, the boat and the station wagon, makes it apparent that the finding of probable cause must be upheld. The affidavit of Deputy Barber revealed the following facts: deputies had observed the loading of a number of heavy parcels from a boat and car into a truck parked outside Cabin Number Six; this truck was later stopped and searched, revealing that the heavy parcels contained marijuana; other heavy parcels seemingly identical to those in the truck remained in the area of the

cabin and were not placed in the truck. These facts authorized an inference that these other parcels were either in the cabin or in the wagon or in the boat, and, further, that it was highly probable that these parcels also contained contraband. Such facts and the reasonable inferences therefrom are sufficient to justify the issuance of the search warrant in this case, keeping in mind that:

> "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed.2d, 147, 85 S.Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311, 18 L. Ed. 2d 62, 70, 87 S.Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed.2d 684, 688, 85 S.Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271, 4 L.Ed.2d 697, 707, 708, 80 S.Ct. 725, 78 ALR 2d 233 (1960)." *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

The argument that the warrant was overly broad is without merit. The warrant, clearly specifying that marijuana was the object of the search, is not objectionable for failure to specify the items to be seized. And the designation of "Cabin No. 6 Crooked River State Park, all autos and outbuildings & boats" is also not objectionable.

> "It is enough if the description is such that the officers with a search warrant can with reasonable effort, ascertain and identify the place intended." *Stelle v. United States*, 267 U.S. 498, 503 (1925).

Here, there was no reasonable probability that other premises not intended to be searched might be mistakenly searched under the warrant. *See United States v. Melancon*, 462 F.2d 82 (5th Cir. 1972).

Conclusion.

In sum, the motion to suppress the evidence seized during the warrantless search of the camper truck is denied. The attack on the validity of the warrant issued for the search of Cabin Number Six is determined to be without merit and the motion to suppress with regard to the evidence seized during the search of the cabin, boat, and station wagon is also denied.

The Remaining Motions

None of the remaining motions merits its being sustained at this time. Clark, named in the conspiracy count only, asks for relief from prejudicial joinder by moving for severance of counts and from the other defendants. The joinder of counts in which a defendant is omitted from some of the counts is clearly permissible under Rule 8(b), Fed. R. Crim. P. As to joinder of defendants, *see generally* 8 J. Moore, *Federal Practice* ¶ 1404[1] and following. If a *Bruton v.*

United States 391 U.S. 123 (1968) question arises, appropriate remedial action can be taken at such time.

Clark's motion for change of venue upon the ground that it is not alleged she committed any overt act in this district or that the conspiracy arose here is clearly without merit. *See* Rule 18, Fed. R. Crim. P., and *Bellard v. United States*, 356 F.2d 437, 438 (5th Cir. 1966).

Clark challenges the sufficiency of Count One insofar as her participation in the conspiracy is concerned but the law is to the contrary. *See United States v. Mendoza*, 473 F.2d 692, 695 (5th Cir. 1972); and *United States v. Nims*, 524 F.2d 123 (5th Cir. 1975).

Satre, Martin and Clark have attacked on various grounds the validity of the statute upon which the indictment is based. 21 U.S.C. §§ 841(a)(1), 952, 846; but the attack is unavailing. *See United States v. Perry*, 480 F.2d 147 (5th Cir. 1973); *United States v. Simpson*, 481 F.2d 582 (5th Cir. 1973); *United States v. Sawyer*, 483 F.2d 663 (5th Cir. 1973); *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973); *United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir. 1972).

The defendants' due process claims stemming from the lack of a stenographic transcript of the grand jury proceedings and because of excessive hearsay are similarly without merit. See *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir. 1976); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969).

Defendants claim double jeopardy in that there are state indictments for the same transactions. Such a "defense is available only when the accused is placed in jeopardy again by the same government for the same offense." 1B J. Moore, *Federal Practice* ¶ 0.418[2] at 2753.

Satre and Martin urge that Counts one and two are duplicitous in that they arbitrarily divide a single offense into

two counts. This Court believes, however, that the test set forth in *Perkins v. United States*, 526 F.2d 688, 690 (5th Cir. 1976) has been met with the result that this objection is without merit.

Defendant Bennett's motions incorporating and adopting all other defendants' motions are similarly denied.

In sum, each and all of the pending motions are overruled.

So Ordered, this 16 day of July, 1976.

ANTHONY A. ALAIMO,
United States District Judge

United States Court of Appeals
for the Fifth Circuit

No. 76-3575

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
PATRICIA F. CLARK, ET AL.,
DEFENDANTS-APPELLANTS.

September 19, 1977.

Appeals from the United States District Court for the Southern District of Georgia.

Before GEWIN, RONEY and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

John Satre, William Martin and Patricia Clark appeal from judgments of conviction entered against them after a non-jury trial in the District Court for the Southern District of Georgia. Each was convicted of one count of conspiracy to possess, with intent to distribute, approximately 1,225 pounds of marijuana (hashish) in violation of 21 U.S.C. § 846. Defendants Satre and Martin were also convicted of one count of possession with intent to distribute marijuana (hashish) in violation of 21 U.S.C. § 841(a)(1).

All the issues raised focus upon the legality of a warrantless search of a pickup truck with an attached camper top (camper truck) and a subsequent search, pursuant to a warrant, of another automobile, a boat, and a dwelling. Specifically, the question for decision is whether or not the district judge committed error in denying the defendants' motions to suppress the contraband. We affirm.

This type of case must stand or fall on its particular facts. We examine the facts derived from the transcript and the findings of fact of the trial court. Almost all the facts are uncontested. Those that are contested are immaterial to the result we reach.

Our inquiry begins at a time two years prior to the challenged searches and seizures. At this early date, Jerry Minchew, the Park Superintendent of Crooked River State Park, Camden County, Georgia became suspicious of the activities of defendant Satre. Satre had been one of a number of individuals who had rented a cabin at the Crooked River State Park. During this earlier stay, he had purchased an expensive boat from a local resident and a few days later had left the boat with another local resident to sell "for what he could get out of it." Minchew testified that while he felt the boat was worth over $1,500, the boat was sold for only $600. Minchew speculated that Satre was involved in the trafficking of drugs.

Minchew remembered Satre when he and four other persons returned to the State Park on December 30, 1975. On this visit, the group rented two cabins from December 30, 1975, to January 10, 1976. Minchew testified that during this period he received complaints from other cabin occupants concerning the noise and late night activities of the group. Minchew's attention was directed towards the vehicles driven by the group. One car bore Idaho license plates; the other vehicles bore Florida tags. Minchew thought this to be suspicious since all the group except defendant Martin had stated that they were from Colorado. Martin stated he was from Boston, Massachusetts. Minchew testified that the Florida license tags did not bear an "E" signifying a rental vehicle.

On January 10, 1976, the group checked out of the cabins and left the park. Yet, on the evening of January 11, 1976, the car bearing the Idaho license plates returned to the Park. Defendants Martin and Pascoe[1] were the occupants of the car. Martin told the Superintendent that he had driven about 50 miles down the road when he discovered that he had forgotten a piece of luggage for which he was returning. Minchew stated that he thought it strange that Martin had left the Park over 24 hours earlier yet stated that he had traveled only 50 miles. Martin retrieved the suitcase and departed.

On the evening of January 13, 1976, defendant Satre reappeared and asked if he could rent one of the cabins the group had previously occupied. When informed that the cabins were unavailable, Satre stated that "he would rather have one down in the bushes."

Before Satre departed for the secluded Cabin Number Six, Minchew observed water pouring from the stern of the boat

[1] Defendant Paula Lynn Pascoe is not a party to this appeal.

being towed by Satre. Satre told Minchew that he had just returned from water skiing in Tampa, Florida. Minchew testified that his suspicions were aroused since it was "real cold weather" and it would be unusual for a boat to be dripping water after a 250 mile drive.

The critical facts which led to the seizure of the contraband occurred later on the evening of January 13, 1976. At approximately 10:00 p.m., Minchew drove by Cabin Number Six and observed that the car with the Idaho plates, the car that had returned for the forgotten luggage, had again returned to the Park. Minchew then contacted the Camden County Sheriff's Office and requested that an officer be dispatched to check into the activities of the occupants of Cabin Number Six.

At approximately 11:00 p.m., Officers Barber and Dudley arrived and ascertained the license numbers of the vehicles so that they could be checked for irregularities. Shortly thereafter, the three officers heard hammering noises in the area of the cabin. From a distance of 35-40 yards, they placed the cabin under surveillance. During this observation period, defendants Satre, Martin and Pascoe were observed building a wooden structure in the back of a camper pickup truck. Shortly after the structure was completed, the officers observed the defendants carrying various large plastic and burlap sacks. The defendants were removing these bags from the boat and loading them into the truck and the station wagon. The bags appeared to be quite heavy.

In conjunction with their visual observations, the officers overheard the defendants make the following comments:

> Female Voice: "Bill, did the Park Superintendent see both of you?"
>
> Female Voice: "Are you going to give them the best load now or wait and give them the best load later?"

Male Voice: "Did you get the shotgun? Be sure and get the gun, get the shotgun".

As a result of the above observations, Deputy Barber radioed Chief Deputy Kennedy of the Camden County Sheriff's Office for additional assistance. Officer Kennedy was en route to the Park when the pickup truck, occupied by defendants Martin and Satre and containing the wooden structure and the large plastic and burlap bags, departed from the area of Cabin Six.

The officers relayed the events they had witnessed and their suspicions to Officer Kennedy. Officer Kennedy, who was en route to the Park, was alerted that the pickup truck was proceeding in his direction and was requested to "check it out."

Kennedy spotted the truck coming out of the Park, turned around, and followed it for a distance of 2-3 miles. He testified that it appeared heavily loaded and was weaving. Having been advised to use caution because of the possibility that the occupants were armed, Kennedy radioed Officer Carter of the St. Mary's Police Department for assistance. After Officer Carter came into sight, Kennedy pulled over the truck.

Martin, the driver, and Satre emerged from the truck. Officer Kennedy advised the defendants to keep their hands out of their pockets and asked Martin for his driver's license and the motor vehicle registration certificate. Officer Kennedy testified, and the District Court found that Martin produced a driver's license but no vehicle registration.

Kennedy then asked Martin if he could take a look in the truck. Martin replied, "Go Ahead." Kennedy shined his flashlight through a window of the truck. He observed on the floorboard of the vehicle a plastic bag containing a marijuana-like substance. He also testified that he smelled a strong odor of marijuana coming from the truck and that Martin appeared to be "stoned" or intoxicated on drugs.

Martin and Satre were placed under arrest and the truck was thoroughly searched. The search revealed that the wooden platform the defendants had constructed was designed to be a false bottom. Underneath the platform, the large burlap and plastic bags were found. Over 700 pounds of hashish was found in these bags.

Shortly after the arrest of Martin and Satre, Officer Barber appeared before a Camden County Justice of the Peace who, based upon the affidavit of Officer Barber, issued a search warrant for Cabin Number Six and the boat and station wagon, which had remained at the Park.

In executing the search warrant, over 500 pounds of hashish was found in the station wagon and a small quantity of the contraband, approximately 5-6 pounds, was found in the cabin.

Prior to trial, the trial judge held a hearing and after taking evidence, denied the motions to suppress.

With respect to the search of the camper pickup truck, the trial judge held the legality of the search had been established under two theories. First, the Court held that from the totality of the facts and circumstances, the officers had probable cause to stop and search the truck. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed. 2d 596 (1973). Alternatively, the Court held, assuming *arguendo*, that probable cause was lacking, the officers had a reasonable suspicion. Having such reasonable suspicion, the initial stop of the truck was lawful under the "investigative stop" theory. *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *United States v. Rollerson*, 491 F.2d 1209 (5th Cir. 1974); *United States v. Worthington*, 544 F. 2d 1275 (5th Cir. 1977). While main-

taining the status quo pending further investigation, Officer Kennedy then smelled the odor of marijuana and in plain view sighted a clear plastic bag containing a marijuana-like substance on the floorboard of the truck. The officer then possessed probable cause to search the truck. *United States v. Worthington, supra.*

In view of his findings, the trial judge considered it unnecessary to determine the validity of Martin's purported consent to search the truck and to determine the precise moment when the arrest of defendants Martin and Satre occurred. The trial judge also rejected numerous attacks on the legality of the subsequent search warrant and the search of the station wagon and the cabin.

On appeal, the defendants challenge each of the theories supporting the stop and search of the truck. First, they argue that probable cause was lacking and hence the automobile exception to the search warrant requirement does not apply. In attacking the investigative stop theory, the defendants argue that an arrest was made prior to the officer's plain view observation of the contraband and since probable cause to arrest was lacking, the seizure resulted from the exploitation of an illegal arrest.

In this case, while the search of the truck fits clearly within the investigative stop and the plain view theories, we go further and hold that prior to the initial stopping of the truck, probable cause was present.

It has often been held that probable cause to search an automobile exists when the facts and circumstances would lead a reasonably prudent man to believe that the vehicle contains contraband. *United States v. Worthington, supra*; *United States v. Nieto*, 510 F.2d 1118 (5th Cir. 1975); *Williams v. United States*, 404 F.2d 493 (5th Cir. 1968). In determining whether there was reasonable cause to believe the vehicle contained contraband, we look to the

totality of the circumstances and the inferences that flow therefrom. *United States v. Olivares*, 496 F.2d 657 (5th Cir. 1974). While the defendants have stressed how innocuous and unsupportive of probable cause each fact is if taken alone, we do not view the evidence in that manner. As now Chief Justice Burger has stated, "[p]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the 'laminated' total." *Smith v. United States*, 123 U.S.App.D.C. 202, 358 F.2d 833, 837 (1966). Viewing the evidence in this manner it may truly be said that the total may be a sum greater than its parts.

In addition to examining the totality of the circumstances, in view of the degree of communication between them, we look to the collective knowledge of the police officers, rather than the sole knowledge of Officer Kennedy, who performed the search of the truck. *Moreno-Vallejo v. United States*, 414 F.2d 901 (5th Cir. 1969).

We also take into account, the individual experience of the law enforcement officials. *United States v. Chapman*, 413 F.2d 440 (5th Cir. 1969). "Conduct innocent in the eyes of the untrained may carry entirely different 'messages' to the experienced or trained observer." *United States v. Davis*, 147 U.S.App.D.C. 400, 458 F.2d 819 (1972). We think it clear from application of the above principles that the officers had probable cause to stop and search the truck.

Superintendent Minchew had ample cause to be suspicious of the activities of the group and to investigate these activities further. The return of the "Idaho car" on January 11 was unusual in view of Martin's explanation that he had only driven 50 miles away in a 24 hour period. The vehicle had then departed. Yet, two days later, on the night of January 13, it had again appeared within the Park. The

later reappearance strongly cut across the grain of the representations made to Minchew that the group had departed from the area. The divergence between the residences of the defendants and the states in which the vehicles were registered was likewise suspicious since Minchew knew the cars bearing Florida license plates were not rented vehicles. Satre's specific request for a cabin in a secluded area along with his improbable story explaining the recent use of the boat clearly called for further investigation.

Surveillance was begun and the critical facts giving rise to probable cause were observed. At the outset, the officers knew that the defendants wished to avoid detection in carrying out their activities. They had specifically requested Minchew to rent them a cabin in a secluded area. They commenced their construction activities in the darkness of the night and at a late hour. The officers overheard one of the defendants express concern over being detected. The officers overheard one of the group make reference to a firearm.

The transfer of the heavy rubber and burlap bags from the boat, recently removed from the sea, to the truck and the station wagon narrowed the focus of suspicious clandestine, armed activity to that of drug trafficking. Officer Dudley testified that he had been employed in the Narcotics Division of the South Carolina Law Enforcement Division for six years prior to joining the Camden County Sheriff's Office. He testified that he had witnessed coastal drug smuggling operations similar to this one and had seen marijuana or hashish packaged and transported in the manner observed at the Park. The comments of the defendants in reference to the "best load" or "best shipment" gave audible support to the officers' visual observations.

Briefly summarizing, the unusual appearances of the group, their request for a secluded cabin, their desire to

avoid detection, their unusual construction activities, the lateness of the hour, the removal of a large cargo from a boat recently pulled from the sea; the similarity of the packages to those which the officers in their extensive experience knew to be a common method of packaging and transporting hashish; the reference to a firearm for the protection of the defendants and their cargo; the comments concerning the "best shipment or load," and the concealment of the packages within the wooden structure fully supported a reasonable belief that drug trafficking was being observed. Thus from the totality of the circumstances, we hold that the District Court correctly determined that probable cause was present.

The defendants stress the fact that the officers at the Park allowed the truck to leave the cabin site, and only radioed to Kennedy to "check it [the truck] out." Defendants also argue that the actions of Officer Kennedy after stopping the truck only comport with a general license check. The inference compelled by the facts, they contend, is that the officers subjectively felt that probable cause to stop and search the truck was lacking. The defendants seem to argue that if probable cause had been present, the officers would have performed the search at the exact moment such cause arose.

In this case, we find scant support for the argument that the officers believed probable cause to have been absent. Yet, even if the officers felt that probable cause was lacking, an objective standard would still be applicable.

In *United States v. Resnick*, 455 F.2d 1127 (5th Cir. 1972) this Court held that even though a police officer believed that probable cause was lacking, the Court still had the duty to objectively determine if probable cause was present. This Court in finding that probable cause was present held that "the scope of the Fourth Amendment is

not determined by the subjective conclusion of the law enforcement officer." *United States v. Resnick, supra,* at 1132. Of course, police officers are not required to search or arrest at the exact moment probable cause arises. *See United States v. Lovasco,* ____ U.S. ____, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), 21 Cr.L. 3102.

The remaining allegations of error raised by appellants center upon the issuance of the search warrant and the subsequent search of the station wagon and the cabin. The District Court rejected the contentions that the warrant was overbroad and insufficient to establish probable cause.

After the trial of this case and prior to oral argument in this Court, the Supreme Court decided the case of *Connally v. Georgia,* 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (decided January 10, 1977). In *Connally,* the defendant challenged the Georgia fee system for the issuance of search warrants by justices of the peace. *Ga. Code Ann.* § 24-601 provided for a fee of $5.00 if a warrant was issued and no fee if the warrant application was refused. The Supreme Court held that the justice of the peace who issued the warrant was not "a neutral and detached magistrate," in view of his pecuniary interest in the warrant and further held "that the issuance of the search warrant by the justice of the peace in Connally's case effected a violation of the protections afforded him by the Fourth and Fourteenth Amendments of the United States Constitution." At 251, 97 S.Ct. at 549.

On appeal, appellants argue that the holding in *Connally* applies to their case as well since the search warrant for the station wagon and dwelling was issued by a justice of the peace. The Government contends that *Connally* is to be applied on a case-by-case basis, determining in each instance whether or not the justice of the peace had the forbidden pecuniary interest in the issuance of the warrant. The

Government has supplemented the record with an affidavit by the justice of the peace who issued the warrant which states that no fee was received. Neither party addresses the issue of the retroactive application of the *Connally* decision.

On the facts of this case, we reject the parties desire for us to expound upon the application of *Connally*. Rather, we pretermit decision on this issue and all other issues raised concerning the validity of the search warrant.

It is well established that evidence gained by a search conducted under authority of a defective search warrant may still be admissible if an exception to the warrant requirement is present. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In the instant case, there is no doubt that after searching the truck, the officers had probable cause of the highest degree to search the station wagon. They had personally observed the loading of similar burlap bags into the station wagon. Furthermore, it is clear that exigent circumstances were present due to the potential mobility of the vehicle. Thus, the well established automobile exception to the warrant requirement applies and no warrant was required to sustain the legality of the station wagon search in which over 550 pounds of hashish were found. *Carroll v. United States, supra; Chambers v. Maroney, supra.*

The search of the cabin under the authority of the warrant resulted in the seizure of 5-6 pounds of hashish, a minute amount in comparison with the approximately 1220 pounds legally seized. The evidence of the guilt of the defendants was overwhelming and there was a bench trial rather than a trial by jury. Thus, even if we assume *arguendo* that the search of the cabin was illegal because the warrant was defective due to a defective affidavit or because of the application of *Connally,* we conclude without hesitation that the error, if any, was harmless beyond a reasonable

doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Harrington v. California*, 395 U.S. 250, 89 S.Ct 1726, 23 L.Ed.2d 284 (1969).

Having so held, we also need not determine whether defendant Clark had standing to urge the suppression of the contraband. A finding that she had standing, would be of no avail to her since the evidence was legally obtained.

AFFIRMED.